Google Inc. et al v. Egger et al Doc. 450 Att. 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*,	)	Case No. CV 06-274-KI
Plaintiffs,	)	
v.	)	**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR A STAY PENDING APPEAL UNDER 28 U.S.C. § 1292(b)**
GEORGE W. BUSH, *et al.*,	)	
Defendants.	)	**ORAL ARGUMENT REQUESTED**

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INTRODUCTION

Defendants have moved this Court for a stay during the pendency of proceedings in the Ninth Circuit Court of Appeals on defendants' petition for an interlocutory appeal (28 U.S.C. § 1292(b)) of this court's Opinion and Order of September 7, 2006 [hereinafter, "Opn. and Order"]. Defendants filed their petition for an interlocutory appeal on September 20, 2006. Plaintiffs filed an answer opposing the petition on September 29, 2006. The Ninth Circuit has not yet ruled on the petition.

Plaintiffs oppose defendants' motion for a stay pending the proposed interlocutory appeal. Of the factors to be considered on defendants' motion, none favors a stay:

- Defendants have made no showing of a strong likelihood of success on the merits of their proposed interlocutory appeal. Indeed, they have not even attempted to do so.
- There is no risk of irreparable harm to national security absent a stay. The challenged Opinion and Order allows nothing more than plaintiffs' *in camera* reference to the sealed document in further proceedings before this Court, which cannot possibly threaten national security.
- National security is not threatened by what defendants claim is an improper attempt by plaintiffs to discover whether there was a warrant for their surveillance. Defendants have the burden of proving they had a warrant, and they have failed to sustain that burden.

- The public interest favors continued litigation on plaintiffs' recently-filed motion for partial summary judgment or adjudication. That motion raises profoundly important constitutional issues which should be decided expeditiously.

Defendants claim that further proceedings in this Court "may" be futile because the Ninth Circuit might possibly grant an interlocutory appeal and put an end to this litigation on state secrets grounds. Such speculation is insufficient to justify a stay. Defendants are required to demonstrate not just that their proposed interlocutory appeal "may" succeed, but that it has a *strong likelihood* of success. They have failed to do so.

ARGUMENT

I. NONE OF THE PERTINENT FACTORS FAVOR A STAY PENDING DEFENDANTS' PROPOSED INTERLOCUTORY APPEAL.

Defendants' primary argument for a stay pending their petition for an interlocutory appeal is that "[f]urther district court proceedings risk the disclosure of privileged information to Plaintiffs and the public at large, and thus, in Defendants' view, risk serious harm to national security." Memorandum of Points and Authorities in Support of Defendants' Motion for a Stay Pending Interlocutory Appeal Under 28 U.S.C. § 1292(b), at 7 [hereinafter, "Defs. Memo"]. In assessing this argument and deciding whether to grant or deny a stay, this Court must consider three factors: (1) Have defendants established *a strong likelihood of success* on the merits of their proposed appeal? (2) Does the balance of possible *irreparable harm* favor defendants? (3) Does the *public* *interest* favor granting a stay? *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir. 1977).

Defendants have the burden of demonstrating "'either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in [their] favor.'" *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988) (quoting *Los Angeles Memorial Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980)); *accord, WCI Cable, Inc. v. Alaska Railroad Corporation*, 285 B.R. 476, 478 (D. Or. 2002). Defendants' burden of demonstrating irreparable harm increases as their probability of success on the merits decreases. *Dr. Seuss Enterprises, LP v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1397 n.1 (9th Cir. 1997). The relative hardships to the parties is the "critical element" in deciding whether a stay is justified. *Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers*, 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979).

This standard is the same as is employed by district courts when considering a motion for a preliminary injunction. *Tribal Village of Akutan,* 859 F.2d at 1202.

A. Defendants Have Made No Showing Of A Strong Likelihood Of Success On The Merits Of Their Proposed Appeal.

Defendants' memorandum in support of their stay motion does not address the first pertinent factor – whether they have a *strong likelihood of success* on the merits of their proposed interlocutory appeal. They do not.

As defendants observe, this Court "concluded that the 'very subject matter of this litigation' is not a state secret that would require dismissal." Defs. Memo at 4. That conclusion is unassailable. As this Court explained, "the existence of the program is not a secret, the subjects of the program are not a secret, and the general method of the program – including that it is warrantless – is not a secret." Opn. and Order at 15. Defendants have made no effort to – and cannot – overcome this simple logic. And, indeed, every other court that has addressed this point has reached the same conclusion – that defendants' warrantless surveillance program is no longer a secret. *See Hepting v. AT&T Corp.*, 439 F.Supp.2d 974, 994 (N.D. Cal. 2006); *American Civil Liberties Union v. National Security Agency*, 438 F.Supp.2d 754, 764-65 (E.D. Mich. 2006); *Terkel v. AT&T Corp.*, 441 F.Supp.2d 899, 913 (N.D. Ill. 2006).

Defendants' proposed interlocutory appeal poses a single, narrow question: whether plaintiffs' *in camera* reference to the sealed document – which is all this Court's challenged ruling allows plaintiffs to do – will threaten national security. The answer is plainly *no*. The Court's reasoning is simple and impeccable: (1) OFAC accidently disclosed the sealed document to plaintiffs, (2) thus, "it is not a secret to plaintiffs whether their communications have been intercepted," and consequently, (3) "no harm to the national security would occur" if plaintiffs are allowed to prove, *in camera*, what is no longer a secret to them – that they were surveilled. Opn. and Order at 15-16. Defendants presented no challenge to this reasoning in their petition in the Ninth Circuit for an interlocutory appeal, and they do not do so here.

Thus, because defendants have failed to make any showing of probable success on the merits, their burden of showing irreparable injury is at its greatest. *Dr. Seuss Enterprises, LP*, 109 F.3d at 1397 n.1. Defendants must show not just "the possibility of irreparable injury," but moreover that "the balance of hardships tips *sharply* in [their] favor." *Tribal Village of Akutan*, 859 F.2d at 663 (emphasis added).

B. There Is No Risk Of Irreparable Harm To National Security Absent A Stay.

Defendants have not shown *any* possibility of the purported irreparable injury, much less that the balance of hardships tips sharply in their favor.

Defendants contend that further proceedings in this case will risk irreparable harm to national security by disclosing "privileged information not already known to Plaintiffs" – i.e., that plaintiffs have been surveilled. Defs. Memo at 8. As this court has already observed, however, "it is not a secret to plaintiffs whether their communications have been surveilled." Opn. and Order at 15. National security cannot possibly be harmed by "disclosing" to plaintiffs what they already know.

Defendants also contend that further proceedings will risk irreparable harm to national security by disclosing the fact of plaintiffs' surveillance to "the public at large." Defs. Memo at 8. According to defendants' reasoning, "if, after further *in camera* proceedings, the Court decides that the case may proceed, such a decision would necessarily tend to confirm or deny to the public a fact that Defendants believe is properly privileged – *i.e.*, whether the Plaintiffs were subject to surveillance." *Id.*

The fatal flaw in this argument is demonstrated by the unclassified declaration of Director of National Intelligence John D. Negroponte. According to Mr. Negroponte, the harm from disclosing targets of foreign intelligence surveillance is as follows: "If an individual *knows or suspects* he is a target of U.S. intelligence activities, he would naturally tend to alter his behavior to take new precautions against surveillance, thereby compromising valuable intelligence collection." Declaration of John D. Negroponte, Director of National Intelligence, dated 6/21/06, at 6, ¶ 13 (emphasis added). Because of OFAC's accidental disclosure of the sealed document, plaintiffs now *know* that they have been targets of U.S. intelligence activities, which means (according to Mr. Negroponte) they would naturally tend to alter their behavior to take precautions against such surveillance. Disclosure of that fact to the public, through a decision of this case on its merits, will tell plaintiffs nothing that they do not already know and thus will not threaten national security. That is precisely why this Court ruled as it did. *See* Opn. and Order at 15. Plaintiffs need no public airing of the fact of their surveillance in order to be alerted that they should alter their behavior.

This Court has plainly indicated that, in the proceedings to come, the Court will take great care to ensure that defendants are not required to disclose any state secrets, so that no harm will befall the Nation as this case continues to be litigated. Plaintiffs and their counsel pledge to cooperate fully with the Court and defendants to achieve that goal.

If this Court's commitment to protecting national security is not sufficiently reassuring to defendants, they have recourse to alternative strategies. One strategy they can pursue is to move for summary judgment based solely on the legal arguments they have already made publicly in official statements and publications by high government officials and the Department of Justice – similar to plaintiffs' pending request for partial summary adjudication of those legal arguments. If defendants prevail on such a motion, this litigation will end with no possible threat to national security.

Another strategy defendants can pursue is to (1) litigate plaintiffs' pending motion for partial summary judgment or adjudication with a standing objection that defendants cannot fairly litigate the motion without disclosing state secrets, (2) refuse to disclose whatever defendants think must be kept secret, and then (3) appeal to the Ninth Circuit, based on their standing objection, if they lose the motion. If the Ninth Circuit upholds their objection, then – again – the litigation will end with no possible threat to national security.

Yet another strategy defendants can pursue is to have some faith in this Court and allow the case to proceed to discovery on the assumption that the Court will order nothing that imperils national security and will take appropriate measures to allay defendants' concerns that "the *in camera* process may lead to unforeseen disclosures." Defs. Memo at 11. Defendants can seek appellate review of any rulings that they think threaten national security, if and when any such rulings occur. Until such rulings, any threat to national security is only speculative. "Speculative injury does not constitute irreparable injury." *Goldie's Bookstore v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984).

With these various alternative strategies available to defendants, the continued litigation of this case during the pendency of defendants' petition for an interlocutory appeal presents no possibility of harm to national security.

Meanwhile, defendants' program of warrantless electronic surveillance in violation of FISA and the Constitution continues unchecked. Each day of delay in the litigation before this Court is another day in which plaintiffs' statutory and constitutional rights are threatened. "An alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore*, 739 F.2d at 472.[1]

The only threat of irreparable harm here is to plaintiffs. The balance of hardships tips sharply in *their* favor, not in defendants' favor.

C. Defendants have the burden of proving they had a warrant for plaintiffs' surveillance, and they have failed to sustain that burden.

Defendants also contend, for the first time in writing, that national security is threatened because plaintiffs are attempting to discover a privileged fact that they do not yet know – that their surveillance was *warrantless*. Defs. Memo at 9-10. This is sophistry. If there had been a warrant for plaintiffs' surveillance, defendants would have told this Court long ago and thus spared us all any needless further litigation.

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[1]As defendants note, they have asked the Ninth Circuit to grant an interlocutory appeal in this case but then hold the appeal pending the outcome of their petition for an interlocutory appeal in *Hepting v. AT&T Corp.*, 439 F.Supp.2d 974. *See* Defs. Memo at 6, n. 4. The *Hepting* petition, however, was filed *three months ago*, on July 31, 2006, and has not yet been ruled upon. There is no reason to believe, as defendants speculate, that, as between the two petitions, the *Hepting* petition "will likely be acted upon sooner." *Id.* Indeed, it is possible that neither petition will be decided any time soon.

Defendants began developing this new argument at the August 29, 2006 hearing on their dismissal motion, when Mr. Tannenbaum asserted that "[t]here's been a broad assumption in plaintiffs' entire case that the Terrorist Surveillance Program was applied to them and that *there was no warrant*," and that plaintiffs "have to meet *their burden* to prove their case." Transcript of 8/29/06 hearing, at 91:13-15, 93:7-8 (emphasis added). But defendants are wrong about who has the burden of proof here. Whether defendants had a warrant for plaintiffs' electronic surveillance is a matter peculiarly within defendants' knowledge. Consequently, the burden shifts to defendants to prove that they had a warrant. *See, e.g., Campbell v. United States*, 365 U.S. 85, 96 (1961) ("the ordinary rule . . . does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary"); *National Communications Assn. v. AT & T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) ("all else being equal, the burden is better placed on the party with easier access to relevant information"); 9 J. Wigmore, Evidence § 2486, p. 290 (J. Chadbourn rev. ed. 1981) ("the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge" (emphasis deleted)). Where, as here,

> 'the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party.' When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, . . . but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the other party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative.

United States v. Denver & Rio Grande Railroad Company, 191 U.S. 84, 92 (1903);

accord, United States v. Morton, 400 F.Supp.2d 871, 879 (E.D. Va. 2005).

This shifted burden of proof is what plaintiffs' counsel Mr. Eisenberg was alluding to when he said at the August 29, 2006 hearing:

> If there had been a warrant in this case, I have to assume that the Government would have told Your Honor in the secret declarations that we are not privy to. And I am going to have to assume further, Your Honor, in light of what has transpired here today, that the Government has not told Your Honor in classified confidence that there were no – that there were warrants in this case.

Transcript of 8/29/06 hearing, at 96:20-97:2.

Defendants have not sustained this burden of proof in any of their previous public filings in this Court, and evidently they have not done so in any of their secret filings. Unless they do so now in opposition to plaintiffs' motion for partial summary judgment or adjudication, and demonstrate that they had a warrant for plaintiffs' electronic surveillance, this Court should conclude it is indisputable that defendants had no warrant.

Additionally, even without the shifted burden of proof, plaintiffs can prove the absence of a warrant by reference to the contents of the sealed document, as explained in the supplemental memorandum filed under seal in support of plaintiffs' pending motion for partial summary judgment or adjudication.

Further, the posture of this case has progressed to where, if there were any lingering doubt that plaintiffs' surveillance was warrantless – of which there surely is none – such doubt could easily be allayed in the pending discovery proceedings. One of the purposes of the discovery conference this Court has ordered is for the Court to address interrogatories that plaintiffs have propounded and "determine to which interrogatories plaintiffs need answers, and to which interrogatories the government should be required to respond." Opn. and Order at 30. One of those interrogatories asks "whether the FISA court issued warrants for [plaintiffs'] surveillance." *Id.* at 29. FISA expressly authorizes this Court to order disclosure of such information, "under appropriate security procedures and protective orders," as "is necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f).

D. The Public Interest Favors Continued Litigation On Plaintiffs' Pending Motion For Partial Summary Judgment Or Adjudication.

Finally, on the third pertinent factor, one can hardly imagine a public interest more compelling than the one favoring continued litigation in this Court during the pendency of defendants' petition for interlocutory appeal. Plaintiffs have now filed a motion for partial summary judgment or adjudication which puts squarely at issue a constitutional question of profound national importance – whether the President may disregard Congressional legislation in the name of national security. Every American should welcome an expeditious answer to that question.

II. DEFENDANTS HAVE FAILED TO DEMONSTRATE ANY FUTILITY OF FURTHER DISTRICT COURT PROCEEDINGS BY FAILING TO SHOW A STRONG PROBABILITY OF SUCCESS.

Defendants' secondary argument for a stay pending their petition for an interlocutory appeal is that "further proceedings may be futile for several reasons, including most obviously that an appeal may resolve all issues in this case." Defs. Memo at 7.

But speculation that an interlocutory appeal "may" resolve all the issues in this case is not enough to justify a stay. Defendants' burden is to establish "a *strong likelihood* of success on the merits." *Warm Springs Dam Task Force*, 565 F.2d at 551 (emphasis added). That defendants "may" win on appeal does meet this stringent standard.

The only other reasoning defendants advance in support of their proposition that further district court proceedings "may" be futile is an argument they have not made before – that "FISA is not a waiver of sovereign immunity for the recovery of damages against the United States," so that "there is no basis for further discovery proceedings in connection with Plaintiffs' claim for damages under FISA Section 1810." Defs. Memo at 13. Leaving aside the obvious shortcoming in this new argument – that it does not reach plaintiffs' constitutional and international law claims – defendants have asserted it prematurely. Sovereign immunity is an affirmative defense. *State of Nevada v. Hicks*, 196 F.3d 1020, 1030, n.12 (9th Cir. 1999). As such, it must be pleaded. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1112, n.10 (5th Cir. 1985). Defendants have not yet filed an answer to plaintiffs' complaint and thus have not yet put the affirmative defense of sovereign immunity at issue here.

In any event, the issue of sovereign immunity should not be hastily litigated on defendants' motion for a stay pending their petition for an interlocutory appeal. Sovereign immunity would be more appropriately litigated via a motion for summary judgment on that ground, where the issue can be fully argued and considered. Defendants have not made such a motion or previously raised or even suggested the point in any other way.

CONCLUSION

For the foregoing reasons, this Court should deny defendants' motion for a stay during the pendency of proceedings in the Ninth Circuit on defendants' petition for an interlocutory appeal, allowing this litigation to proceed to the discovery conference ordered by this Court in its Opinion and Order of September 7, 2006, and to a decision on plaintiffs' pending motion for partial summary judgment or adjudication.

Dated this 1st day of November, 2006.

/s/ Jon Eisenberg

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